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Consultation and Communication with Indian Tribal Governments – Tips for Establishing a Productive Relationship

Background

Before we address the details and procedures for consulting with Indian Tribes, it is important to understand the federal government's relationship with Tribes and some of the basic principles underlying the importance of Tribal consultation. The federal government has a unique government-to-government relationship with federally-recognized Indian Tribes that arises from Indian treaties, statutes, executive orders, and the historical relations between the United States and Indian Nations. Among other things, the federal government has a trust responsibility to federally-recognized Tribes, and EPA, like other federal agencies, must act in accordance with that trust responsibility when taking actions that affect Tribes. Part of this responsibility includes a need to consult with Tribes and respond to their interests when taking actions that may affect Tribes or their resources. In EPA's landmark 1984 Indian Policy, the Agency stated that the keynote of EPA's efforts to protect human health and the environment on Indian reservations "will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands" (EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 8, 1984). Similarly, in a 1994 memorandum, the President directed all federal agencies to assess the impacts of their plans, projects, programs, and activities on tribal trust resources, assure that tribal rights and concerns are considered in decision making, and, to the extent practicable and permitted by law, consult with tribal governments before taking actions that affect them [Memorandum: Government-to-Government Relations with Native American Tribal Governments, April 29, 1994 (59 Fed. Reg. 22951)].

Executive Order (EO) 13175 states that policies with Tribal implications are defined as "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes."

Tips:

- Timely communication is highly emphasized by tribal environmental professionals who work with their respective EPA contacts. Unlike state and local agencies, tribal government systems vary from tribe to tribe. A tribal leader is responsible for the well-being of an entire tribal community and he/she focuses on the overall government functions. If EPA is planning to extend an invitation to consult with a tribal leader on an environmental issue, an adequate amount of time for the invitation to reach the tribal leader must be taken into account.
- To assist with the communication process, most tribal environmental professionals prefer to be copied on any correspondence going to their tribal leader. This will give the environmental professional time to notify their tribal leader and to prepare more effectively for consultation.
- Consultation generally consists of meaningful and timely communication between EPA officials and tribal government officials in developing Agency actions that affect tribes. Consultation means open sharing of information, the full expression of tribal and EPA views, a commitment to hear and understand tribal views in decision-making, and respect for tribal self-government and sovereignty.

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- **Consultation vs. Participation/Collaboration:** It is important to distinguish between government-to-government consultation and participation/collaboration of tribal environmental professionals. EPA carries out outreach activities pursuant to the CAA, but efforts typically involve members of the tribal air quality program directly and are normally separate from consultation or discussions with the tribal government. Consultation should occur with tribal leaders in addition to the participation/collaboration process with tribal environmental professionals.
- **Federal Indian Trust Responsibility:** Government-to-government consultation recognizes and ensures the federal government's trust responsibility to protect tribal sovereignty.
- A Tribal Government may have its own consultation policy so be sure to ask and request a copy if one is available.
- Tribal governments do not have the same organizational structure as a state or local agency. The environmental office structure also varies from tribe to tribe.
- Where appropriate, a participation/collaboration plan should be developed in consultation with the tribal government since the tribe may be able to help EPA design the communication approach that best reflects the tribal community's practices.
- **Getting the Ball Rolling:**
 - Communication between the regional tribal coordinator, permit program staff, and regional counsel or Office of General Counsel should begin early.
 - Determine whether a onsite or nearby facility is of interest to a tribe
 - Consult with the tribe as soon as possible
 - Develop a communication plan with the tribe to keep them apprised of the permit process
 - If a tribe does not immediately get involved, send updates to the tribal officials throughout the process so that they are aware of progress and know that the invitation for consultation is still open
- **Did You Know:**
 - A facility could be of interest to a tribe even if it is not located in Indian Country or if it is on tribal land that is no longer occupied by tribal members
 - A tribe might have a treaty right to engage in certain uses, such as to take water or to hunt, fish, or gather.
 - A tribe also might have rights regarding areas of cultural or religious significance.
 - Be sure to confer with all EPA staff (tribal coordinator, permit program, legal counsel, etc.) for advice.
 - Tribal members favor their privacy when it comes to customs, practices, use of tribal lands, natural resources, language, to name a few.
- **Be Aware of Your Perceptions and Be Open-Minded:** It is natural for us to apply our own experiences, based on our own way of life, to new situations. However, we need to be aware that certain aspects and/or lifestyle of a tribe can differ greatly from mainstream U.S. culture. When working with a tribe, be aware of these differences. Communication with tribal members can be productive if you better understand the unique issues and dynamics of an individual tribe.
- **Tribe-Specific and Site-Specific Factors:** Each tribe is unique. You may want to find out how each tribal government is set up so that communication is clear and productive. Each tribe has its own traditions, politics and lifestyle.

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- Privileged or Confidential Cultural Information: A tribe may have cultural factors that they are trying to protect and may not want to disclose specific information regarding these resources. Be prepared to discuss with each tribe whether there are issues of unique sensitivity to the tribe. If a tribe is not willing to provide specific data regarding cultural factors, try to find other ways to document the tribe's general concerns.